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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-75

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HARLAN L. HACKBERT
208 South LaSalle Street
Chicago, Illinois 60604
FR 2-5600

Of Counsel:
JAY A. LIPE
JAMES T. HARRINGTON
HACKBERT, ROOKS, PITTS,
FULLAGAR AND POUST

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ARGUMENT

a. INTRODUCTION

The initial Petition for Certiorari filed in this matter fully sets forth the questions presented and the reasons for granting the Writ. These issues are far broader, however, and of much greater general importance than can be determined from the Justice Department's Brief in Opposition. Moreover, because the Department's Brief, apparently filed sixty-three days after the Petition without benefit of an extension of time, unaccountably makes

several crucial misstatements of fact which will seriously mislead the Court if not corrected, Petitioner is compelled to submit this reply.

b. RESPONDENT'S FACTUAL ERRORS

First, despite the contrary allegation in Respondent's Brief, Petitioner did not have the benefit of the decision of the Court of Appeals for the Third Circuit in *PICCO, United States* v. *Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468 (3rd Cir. 1972), at the trial of this case in the District Court (Respondent's Brief p. 3, fn. 1). In fact, this case was tried in October of *1971,* almost eight months *prior* to the *PICCO* decision. At the trial, Petitioner therefore relied upon the official regulations to establish its defense to the criminal charges as a matter of law rather than of fact. Petitioner contends here that this reliance alone is sufficient to establish a defense. Should the Court disagree however, Petitioner should be given the opportunity to establish reliance as a matter of fact on retrial by the District Court.

Second, the name of Petitioner is United States Steel Corporation, not Republic Steel Corporation, and Petitioner was *not* a party to the litigation in *United States* v. *Republic Steel Corporation,* 155 F. Supp. 442 (N.D. Ill. 1957); *United States* v. *Republic Steel Corporation,* 286 F. 2d 875 (7th Cir. 1961) as implied by Respondent at page 9 of its Brief, and as a consequence made no payments to the Corps of Engineers pursuant to that litigation for the dredging of any river. Had the government bothered to consult a map it could easily have determined that the Grand Calumet River in Indiana *is not* the same River as the Calumet River in Illinois which was involved

in the *Republic Steel* litigation. The two rivers are many miles apart, in different states and are completely desparate in character. Neither Petitioner nor the United States Army Corps of Engineers has *ever* dredged the portion of the Grand Calumet River here in question for the purpose of preserving its navigability. Petitioner consistently maintained below that this portion of the Grand Calumet River was in fact non-navigable. Finally, there is no evidence in the record upon which to conclude as the government does (Respondent's brief pp. 7 and 9), that the discharges involved here was "similar" to those involved in the *Republic* litigation, as no quantitative or qualitative tests whatsoever were performed on the solids allegedly discharged by Petitioner here.

Third, contrary to the import of page six of the Respondent's Brief, Petitioner twice made specific request at trial for the admission of its Exhibits C and D, (public statements of the Corps of Engineers that the Grand Calumet River was not navigable, and the Corp's decision not to exercise jurisdiction over this portion of river) for the express purpose of demonstrating that such notices affirmatively misled Petitioner as to the application of the statute. (Tr. 475, 521). This offer coupled with the government's stipulation that there existed no contrary notices, (Tr. 483-84) amply established a Due Process defense and preserved the question for appeal.

Fourth, Respondent has suggested that Section 402(k) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) §1342(k) deprives the case of general importance for the reason that an application for permit pursuant to Section 402 would be a defense to a prosecution for violation of 33 U.S.C. §407. It should

be here emphasized that such a position is completely contrary to Justice Department assertions in other cases where it has contended that the Federal Water Pollution Control Amedments of 1972 have no effect on actions pending prior to the effective date of that legislation in October of 1972. (See e.g. *United States, et al* v. *United States Steel Corporation*, 72 C 2503 pending in the Northern District of Illinois, Eastern Division.)[1] It has even

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[1] In that case, the United States made the following contentions in its "Memorandum of the United States of of America in Opposition to Defendant's Motion to Dismiss:

> "The 1972 amendments to the Federal Water Pollution Control Act, while providing that applicants for Refuse Act permits shall not be in violation of the Refuse Act until December 31, 1974 or, if sooner, until final administrative action has been taken on permit applications submitted under the new statute (Section 402(k)), also provide that no suit, action, or other proceeding lawfully commenced by an officer of the United States shall abate by reason of the taking effect of the Amendments (Section 4(a))."
>
> • • •

The Savings (Section 4(a)) operates to continue previously existing laws in effect for the purpose of determining the proceedings begun under those laws.

• • •

The Refuse Act is not repealed by the 1972 Amendments to the Federal Water Pollution Control Act. Section 511 of the Amendments specifically provides:

> "This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act. . . ."

Application of the Refuse Act to the facts of this case is not suspended for the reason that defendant submitted a permit application for its Waukegan Works prior to the institution of this action. 33 CFR Section 209.131(d) (4) of Part 202, Chapter 2, in effect on the date this action was instituted states:

been asserted that discharges occurring prior to the establishment of the Refuse Act Permit Program, or thereafter even in circumstances where a permit was applied for but not acted upon, were nevertheless illegal and subject to prosecution.[2] Thus, under the Justice Department's previously stated theory, the over 17,000 permit applicants *would* be subject to prosecution for all discharges within the statute of limitations which occurred prior to October of 1972. Demonstrative of this position, the Justice Department has shown its willingness to pursue such cases and force a case by case determination of individual factual reliance on the regulations which this Court found in *PICCO* to be sufficient to constitute a defense. Both judi-

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[1] (continued)

". . . the mere filing of an application requesting permission to discharge or deposit into navigable waters or tributaries thereof will not preclude legal action in appropriate cases for Refuse Act violations."

These arguments were apparently adopted by the District Court in denying Defendant's Motion to Dismiss and the case is still pending, as are other cases involving this Petitioner and others.

Furthermore, United States Environmental Protection Agency Regulations now state at 40 CFR, Section 125.42:

"(b) Except as provided in section 402(k) of the Act, the mere filing of an application for a permit to discharge into waters covered by the NPDES will not preclude legal action in appropriate cases for violation of the Act and section 13 of the Act of March 3, 1899 (the Refuse Act). The institution of either a civil or criminal action by the United States may not preclude the acceptance or continued processing of a permit application."

(38 FR 13527, May 22, 1973; as amended by 38 FR 17999, July 5, 1973, and 38 FR 198944, July 24, 1973).

[2] 3 Environment Reporter, *Current Developments*, 1229-1230 (Feb. 9, 1973).

cial economy and the rights of those subject to the statute will thus be served should the Court determine by a decision here whether reliance on the regulations as a matter of law can establish a similar defense.

Lastly, the government's brief completely ignores the undisputed fact that this Court expressly refused to pass upon the question of the proper accommodation and interpretation of the Rivers and Harbors Act in light of the various existing federal water pollution control statutes. See Footnote 10 to the *PICCO* opinion. Thus this Court has clearly left open the proper interpretation of the Rivers and Harbors Act to await the presentation of a case involving the proper factual circumstances. Petitioner respectfully urges that this case offers the Court its awaited vehicle in which to complete the interpretation task left unfinished in *PICCO*.

CONCLUSION

For the reasons set forth in the Petition and above and because the Government has stated no valid reason for denying the Petition, Certiorari should be granted.

Respectfully submitted,

HARLAN L. HACKBERT
208 South LaSalle Street
Chicago, Illinois 60604
FR 2-5600

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